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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN JOSE DIVISION**

14 JAMES LIGON

15 Plaintiff,

16 v.

17
18 JOE LAFAUCI, INDIVIDUALLY AND
19 AS AN OFFICER OF THE
CALIFORNIA HIGHWAY PATROL

20 Defendant.

Case No.: CV 13-02875-RMW

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION IN LIMINE NO. 4 TO
EXCLUDE TESTIMONY OF
EXPERT DARRELL L. ROSS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Date: January 15, 2015
Time: 2:00 p.m.
Courtroom: 6, 4th Floor
Judge: Ronald M. Whyte

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26 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:**

27 PLEASE TAKE NOTICE that on January 15, 2015, at 2:00 p.m., or as soon
28 thereafter as this matter may be heard in Courtroom 6 of the above-entitled Court,

1 Plaintiff will and hereby does move the court by way of this Motion in Limine No. 4 to
2 exclude testimony of expert Darrell L. Ross. Plaintiff makes this Motion under Federal
3 Rules of Evidence 401, 402, 403, 702, and 703. This Motion is based on this Notice of
4 Motion, the Memorandum of Points and Authorities, the records and files of this Court,
5 and upon such other oral and documentary evidence as may be presented at the time of
6 the hearing.

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8 DATED: January 2, 2015

9 LAW OFFICE OF MORALES & LEAÑOS

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11 BY: /s/ Jaime A. Leños

12 JAIME A. LEAÑOS

13 Attorney for Plaintiff
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MEMORANDUM OF POINTS AND AUTHORITIES**PRELIMINARY STATEMENT**

Defendant has designated two police practice experts, Curtis Cope and Darrell L. Ross. Curtis Cope is listed as a Police Practice and Procedure, Use of Force and Police Supervision and Training Expert. Darrell Ross is listed as a Police Use of Force Standards and Training, Human Factors Impacting the Use of Force, and Police practices and Procedures Expert. Plaintiff is requesting that this Court exclude defense expert Darrell L. Ross' testimony at the trial in this matter. Darrell L. Ross does not opine on the issues of police procedures. Instead, he "purportedly" opines on the issue of human factors and offers improper factual and credibility opinions as to why Officer Lafauci's shooting of Plaintiff James Ligon was reasonable and justified.

The overwhelming majority of Darrell L. Ross' opinions have no factual basis, consist of improper credibility determinations, do not involve specialized knowledge, and will not assist the jury's understanding of the evidence or to determine a fact in issue, making them inadmissible under Federal Rule of Evidence 702. The jury is capable of deciding this case on the applicable jury instructions and the evidence it will hear as to how the shooting of James Ligon ("Plaintiff") occurred. Alternatively, even assuming that Defendants could satisfy Rules 702 and 703, the Court should exclude Darrell Ross' testimony under Rule 403 because any speculative probative value would be substantially outweighed by the danger of confusing and misleading the jury with needlessly cumulative testimony. There is no need for two defense experts to testify to police procedures and therefore, Darrell L. Ross' testimony should be excluded.

ARGUMENT**A. Darrell L. Ross' Testimony is Inadmissible Under Federal Rules of Evidence 401, 402, and 702**

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1 Federal Rule of Evidence 401 defines “relevant evidence” as evidence having
2 any tendency to make the existence of any fact that is of consequence to the
3 determination or the action more probable or less probable than if would be without the
4 evidence. Rule 402 states in part that evidence which is not relevant is not admissible.

5 Parties may introduce expert testimony only if “scientific, technical, or other
6 specialized knowledge will assist the trier of fact to understand the evidence or to
7 determine a fact in issue” Under Rule 702, a witness qualifies as an expert if they
8 possess the requisite “knowledge, skill, experience, training, or education,” and they
9 may testify as to their opinion only if their testimony is “reliable,” meaning “(1) the
10 testimony is based upon sufficient facts or data, (2) the testimony is the product of
11 reliable principles and methods, and (3) the witness has applied the principles and
12 methods reliably to the facts of the case.” Fed. R. Evid. 702. At no time may an
13 expert witness usurp the exclusive function of the jury to weigh evidence and to
14 determine credibility. *See United States v. Ward*, 169 F.2d 460, 462-63 (3d Cir. 1948);
15 *Cf. United States v. Romo*, 413 F.3d 1044, 1050 (9th Cir. 2005) (holding that
16 admission of expert testimony was abuse of discretion because a lay juror was
17 qualified to decide whether a reasonable person would have foreseen that a letter to the
18 President represented a threat). Importantly, under Rule 104(a), Defendants have the
19 burden of establishing that the pertinent admissibility requirements are met by a
20 preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171, 176
21 (1987). Here, Defendants have not satisfied that burden.

22 In this case, the jury will hear evidence concerning an incident wherein Plaintiff
23 was shot numerous times when Officer Lafauci fired rounds from his weapon at
24 Plaintiff who was unarmed and not threatening Officer Lafauci or any other individual.
25 The jury will decide on that evidence whether or not Officer Lafauci’s use of deadly
26 force was reasonable. Under the applicable jury instruction, the jury is to determine
27 this ultimate issue with reference to the following non-exhaustive factors: (1) The
28 severity of the crime or other circumstances to which the officers were responding; (2)

1 whether the Plaintiff posed an immediate threat to the safety of the officers or to
2 others; (3) whether the Plaintiff was actively resisting arrest or attempting to evade
3 arrest by flight; (4) the amount of time and any changing circumstances during which
4 the officers had to determine the type and amount of force that appeared to be
5 necessary; (5) the type and amount of force used; and (6) the availability of alternative
6 methods to detain Plaintiff. *See* Ninth Circuit Model Jury Instruction No. 9.22.
7 Determining these types of factual issues is the central function of the jury—weighing
8 the credibility of witness testimony against other testimonial and documentary
9 evidence using common sense and shared human experience. Indeed, the jury will
10 receive Ninth Circuit Model Instruction No. 1.11 (Credibility of Witnesses), which
11 instructs it to account for various factors that bear on believability, including “the
12 opportunity and ability of the witness to see or hear or know the things testified to,”
13 and “the witness’s memory.”

14 Mr. Ross’ report is replete with opinions on ultimate issues to be decided by the
15 trier of fact. Under the first element of Rule 702, Darrell Ross’ opinions are
16 inadmissible because they are not based on “scientific, technical, or other specialized
17 knowledge”—rather, the conclusions reached in his “opinions” are undeniably within
18 the jury’s own expertise based on its experience and common sense. Because the jury
19 can and will follow this plain language instruction, Darrell Ross’ opinions are
20 inappropriate. For the purposes of this memorandum, listed below are just a few
21 pertinent examples of Darrell L. Ross’ “expert” opinions of which this Court should be
22 aware.

23 1) That Officer Lafauci’s use of lethal force was objectively reasonable and
24 was used in self-defense; (This is a question of fact for the jurors).

25 2) In any use of force analysis the United States Supreme Court has
26 established that the review be performed from the perception of the officer, among
27 other factors; (This is an incorrect statement of the law. It suggests that an officer’s
28 use of force is a subjective analysis and not an objective analysis as required under

1 Graham v. Conner).

2 3) In summarizing Mr. Ligon exiting his vehicle, Mr. Ross ignores that
3 civilian witness Bryan Van Dyck testified that he observed plaintiff crossing the street
4 before he was shot. Mr. Ross then summarizes that Plaintiff charged directly at Officer
5 Lafauci; (This is an improper attempt to undermine the credibility of Brian Van Dyck
6 and boost the credibility of Officer Lafauci).

7 4) Mr. Ross also opines that when Mr. Ligon exited his vehicle that he made
8 direct eye contact with Officer Lafauci when he made threatening comments.
9 However, Mr. Ross ignores Plaintiff's testimony that he was blinded by the police
10 vehicle lights and could not see the officer(s) prior to being shot; (This is an improper
11 attempt to attack the credibility of James Ligon and an attempt boost the credibility of
12 Officer Lafauci).

13 5) Mr. Ligon clearly presented an imminent threat of harm to the officers;
14 (This is a question of fact for the jurors).

15 6) Officer Lafauci processed the pattern of behaviors and statements of Mr.
16 Ligon and justifiably formed the perception that he ("Plaintiff") was indeed attacking
17 him; (This is a question of fact for the jurors).

18 7) In my opinion a reasonable officer on scene faced with the same set of
19 circumstances would have responded as Officer Lafauci did: (This is a question of fact
20 for the jurors).

21 8) Santa Clara County Supervising District Attorney Brian Welch reviewed
22 this shooting incident and determined that Officer Lafauci was justified in using lethal
23 force and acted lawfully (May 14, 2013); (The finding referenced in Darrell Ross'
24 Report by Supervising District Attorney Brian Welch is a criminal investigation by the
25 Santa Clara County District Attorney's Office and not relevant to Plaintiff's civil
26 claim).

27 Darrell Ross' expert opinions also fail under Rule 702 because they do not assist
28 the jury in its determination of the facts or of the ultimate issue of whether Officer

1 Lafauci exercised excessive force. Instead, Darrell L. Ross improperly states what he
2 perceives to be the relevant “facts” after weighing competing witness’ testimony and
3 making credibility determinations. *See United States v. Ward*, 169 F.2d 460, 462-63
4 (3d Cir. 1948) (At no time may an expert witness may usurp the exclusive function of
5 the jury to weigh evidence and to determine credibility). Importantly, Darrell L. Ross’
6 statement of the “facts” is even less helpful to the jury since at no time did he ever
7 assume anything in the officers’ statements to be untrue. Nor did he ever consider or
8 apply that the testimony of Officer Cory Walczak, Brian Van Dyck or Plaintiff James
9 Ligon that contradicted Officer Lafauci’s version of events.

10
11 **B. Darrell Ross’ Testimony is Inadmissible Under Federal Rules of Evidence**
12 **403**

13 Alternatively, Darrell L. Ross’ testimony should be excluded under Federal Rule
14 of Evidence 403. Rule 403 excludes evidence the probative value of which is
15 substantially outweighed by the danger of unfair prejudice, confusing the issues,
16 misleading the jury, or an undue consumption of time. Fed. R. Evid. 403.

17 The defense has disclosed two police practice experts. If the court grants
18 Plaintiff’s motion to exclude or limit Darrell L. Ross testimony, the defense should not
19 be allowed to call a second police practice expert under the guise of being a “human
20 factors” expert. Under Federal Rule of Evidence 403 this would cause an undue
21 consumption of time.

22
23 **CONCLUSION**

24 For the foregoing reasons, Plaintiffs respectfully request that this Court grant
25 Plaintiffs’ Motion in Limine No. 4 in its entirety.

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1 DATED: January 2, 2015

2 LAW OFFICE OF MORALES & LEAÑOS

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4 BY: /s/ Jaime A. Leños

5 JAIME A. LEAÑOS

6 Attorney for Plaintiff